IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 698 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

VALSINH SHGANKARSINH PAVAR

Appearance:

MR KC SHAH, APP for Petitioner

MR JC SHETH for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 02/08/2000

ORAL JUDGEMENT

1. This appeal is preferred by the appellant- State of Gujarat under sec.378 of CrPC against the judgment and order of acquittal passed by the learned Chief Judicial Magistrate, Godhara, on 29.6.1991 in Criminal Case

No.1905/87.

2. Respondent, a constable serving in SRP, Gr.V at Godhara, was prosecuted for the offence punishable under sec.66(1)(b) R/w sec.85(1)(3) of the Bombay Prohibition Act. It is the case of the prosecution that on 17.10.1987, respondent-accused was found in a drunken condition and was arrested. Blood sample was taken from the body of the respondent as per rules. The Medical Officer who has examined the accused, also found him in drunken condition and his mouth was also found with bad smell of alcohol consumed by him. He was, therefore, chargesheeted and was sent for trial. After conclusion of trial, learned Chief Judicial Magistrate acquitted the accused on the ground that the blood of the accused was not analysed within a period of four days and, therefore, he requires to be acquitted. Accordingly, vide impugned judgment and order, respondent accused came to be acquitted.

3. Grievance of the appellant-State before this Court is that the blood is required to be sent for analysis within a period of 7 days from the date of collection and in this case, blood was sent for analysis within a period of 7 days as prescribed under the Rules and, therefore, the impugned order of acquittal recorded by the learned Magistrate on this sole ground is erroneous and apparently wrong and, therefore, the same requires to be reversed and accused requires to be convicted for the aforesaid offence.

4. I have gone through the entire judgment as well as oral as well as documentary evidence led by the prosecution. I have also gone through relevant rules and I am satisfied that the sample was to be forwarded within 7 days and not within 4 days. However, on careful evaluation of entire piece of evidence available on record, the Court feels that leaving the above ground on which learned Magistrate acquitted the respondent accused, on other counts, original accused could not have been convicted by the trial Court. It is settled legal position that even at this stage, this Court can exercise discretion and evaluate such evidence instead of remanding the matter back to the trial Court, after a long lapse of time i.e. of about nine years. It is in the evidence of Dr.Vijendra (exh.28) that accused was found physically normal and was stable while walking. Nobody has supported the prosecution case about the alleged misbehaviour of the respondent accused under the influence of alcohol. Dr. Vijendra has accepted in his evidence during the course of cross-examination that seal

on exh.31 was not legible. It is also in evidence that when sample was collected, department also keeps medicines there which contain alcohol. Peon has also helped him in the process of taking blood sample from the body of the accused. It transpires that blood sample was collected on 13.10.1986 and was analysed, as reflected from the judgment, on 28.10.1986. When sample reached the Laboratory is the question and the same is not replied by the prosecution in a convincing manner. Mere despatch of the sample within seven days would not meet the requirements of the Rules in its true letter and spirit. It is not necessary to quote relevant rule, but it would be in the fitness of things to refer to the ratio laid down by this Court in the case of Malahava Rao Bhagwandas Kharade v/s State of Gujarat, reported in 1971 GLR 956. In the aforesaid case, the Court has observed that " the legislature must have in its wisdom provided the period of seven days for the blood sample to reach the testing authority with a view to see that there may not be any tampering with blood sample collected or that the alcohol contents of the sample of blood may not increase if it was kept in possession of the medical officer or his subordinate for an unduly long period." Carrier of the sample has not been examined and no one has given specific date of delivery of the sample in question to the testing laboratory. So, totality of the facts available on record prompts me to reach a conclusion that merely because the reason assigned by the trial Court acquitting the accused is not found satisfactory, the entire case should not be remanded for reconsideration. Appellate Court, if is able to reach its own conclusion by rewriting the judgment on altogether a different count,the same can be done and I am inclined to exercise that jurisdiction in a special facts and circumstances in favour of the respondent accused. It is pertinent to note that incident had occurred in the year 1986 and after lapse of about 14 years, it would not be just, proper and in the interest of justice to remand the matter for reconsideration afresh. Non-availability of date of receipt of blood sample by FSL goes to the root of the matter. Trial Court could have mentioned this ground in its judgment. Illegibility of seal on exh.31 would be relevant in light of this fact. It would also not possible for such witnesses to remember exactly what had happened at the relevant point of time. That would result into exercise in futility. Since this much long lapse of time, sword of democle is hanging over the head of the accused and it would not be just and proper at this stage again to conduct the trial de-novo which would further consume considerably long time. It is also settled legal

position that in acquittal appeals, even if there are two views possible, the appellate court should be Zealous to adopt the view which is in favour of the accused and would be sloth to adopt the view which is against the accused.

5. For the reasons aforesaid, there is no substance in the appeal and hence appeal is dismissed. The impugned judgment and order dated 29.6.1991 passed by learned Chief Judicial Magistrate, Godhara in Criminal Case No.1905/1987 acquitting the respondent accused for the offence punishable under sec.66(1)(b) and 85(1)(3) of Bombay Prohibition Act, is hereby confirmed, of course on the grounds stated herein above.

2.8.2000 [C.K. BUCH, J]
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